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January 3, 1979

Mr. James A. Robischon
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1341 Harrison Avenue
Butte, Montana 59701

Subject: United States of America v.
Atlantic Richfield Company

Dear Jim:

November 20, 1978, I forwarded to you Draft No. 1 of defendant's motion to dismiss, which was prepared after the first meeting of counsel in Louisville in November.

During the meeting in Los Angeles last month, a portion of our discussion was devoted to additional matters which might be included in the initial motion, and I indicated that I would redraft the same to incorporate the suggestions which were made. Since then, redrafting of the motion to strike has been in progress, in light of the research which has been done by us since the meeting in Los Angeles.

Yesterday you informed me that you had been served with an amended complaint by the United States Attorney's office, which was under the signatures of Messrs. O'Leary, Merman, Waters and Cannon, who signed the original complaint, but which does not contain the name of James W. Moorman. You stated that a copy of the amended complaint would be mailed but, in the meantime, summarized some of the allegations so that thought could be given as to the responses which should be made.

As I understand it, the amended complaint designates Atlantic Richfield Company ("ARCO") and The Anaconda Company ("Anaconda") as defendants. There are some allegations concerning the January, 1977, "merger" which may or may not be technically accurate. In addition, plaintiff alleges that Anaconda owns and operates the Columbia Falls aluminum reduction plant. Thereafter, however, it is alleged that "defendants" committed certain acts which resulted in injuries to plaintiff.

The filing of the amended complaint poses several questions:

1. Should one motion be filed on behalf of defendants, seeking to dismiss the amended complaint or, in the alternative, certain portions thereof, or

2. Should there be one motion filed on behalf of ARCO, seeking to eliminate it as a party defendant, and a motion to dismiss and to strike filed on behalf of Anaconda?

As I indicated to you over the telephone yesterday, I believe that the second alternative is the one that should be followed, but we agreed that some legal research would be involved in order to reach a final conclusion. Such research would relate essentially to the question of the liability of a parent corporation for the tortious acts allegedly committed by its wholly owned subsidiary and its predecessors.

Assuming that ARCO is not, as a matter of law, liable for any tortious acts allegedly committed by Anaconda or its predecessors causing injury to plaintiff, we are faced with the problem that the amended complaint contains conflicting allegations. Thus, as I understand it, paragraph 4 contains an allegation that Anaconda owns and operates the plant at Columbia Falls, whereas in the allegations contained in paragraphs such as 9 through 12, reference is made to acts by "defendants" and the consequences thereof. Offhand, it appears to me that a motion to dismiss on behalf of ARCO would be fruitless, and the most effective means of resolving the question of ARCO's liability to plaintiff is a motion for summary judgment under Rule 56, probably supported by affidavits of personnel of Anaconda and ARCO. We agreed to discuss this further this week and hope to make a joint recommendation. However, it appears that a final decision as to the procedure to be followed as to this aspect of the case may have to be deferred until our January 18 meeting in Los Angeles.

On the assumption that a separate motion will be filed on behalf of ARCO for the purpose of eliminating it from the case, I have redrafted defendant's motion to dismiss and enclose Draft No. 2 of motion to dismiss and to strike of defendant The Anaconda Company. My comments concerning the same are as follows:

1. As to the failure to state a claim, there appears to be no particular basis for this at the moment.

2. With respect to the matter of primary administrative jurisdiction, the work on this is essentially completed, and I will forward a copy of our second draft of this in advance of the January 18 meeting for review and consideration.

3. As to striking the allegations concerning wildlife, I am still in the process of obtaining information from Ed Twine on this and hope to have a memorandum completed and distributed before our meeting.

4. The striking of portions of the complaint relating to injunctive relief is based upon the following three arguments which will require the court only to review the allegations of the amended complaint and to take judicial notice of certain matters of public record.

a. Based upon the provisions of 42 USC, § 7416, of the Clean Air Act of 1970, as amended, the court lacks power to enjoin the operation of the aluminum reduction plant because the state, acting in a legislative capacity, has exclusive power to adopt emission standards or limitations for the plant.

b. The court will not enjoin activity expressly authorized by the legislature, even though it may grant plaintiff damages resulting from the same activity.

c. Plaintiff has an adequate remedy at law, inasmuch as plaintiff seeks to recover permanent damages for injury occurring as a result of the acts alleged.

5. The matter of treble damages has been fully researched and the results of this research forwarded to you with my letter of November 30, 1978, as supplemented by my letters of December 6, and 13, 1978.

After you and the others receiving copies of this letter and the enclosure have had an opportunity to consider the same, will you please forward to me any comments that you may have as soon as possible. I would hope that the enclosure will receive final approval on January 18 and then could be set aside for filing.

Very truly yours,

Fredric A. Yerke

cc: Mr. Krest Cyr
Mr. R. B. Steinmetz, Jr.
Mr. Edgar H. Twine

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